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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-6866

EUGENE E. HICKS, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

GREENBERG, *Judge*: Vietnam War Veteran Eugene E. Hicks appeals through counsel an August 3, 2021, Board of Veterans' Appeals decision that denied service connection for a (1) right knee disorder and (2) renal mass, to include as due to exposure to herbicide agents and as secondary to service-connected diabetic nephropathy. Record (R.) at 5-11. The appellant argues that VA failed to satisfy the duty to assist by not obtaining all the appellant's private treatment records, and that the Board (1) failed to ensure substantial compliance with its prior remand instructions, and (2) provided an inadequate statement of reasons or bases for its determinations. Appellant's Brief at 9-30. The Secretary concedes that the April 2021 renal mass medical opinion is inadequate because the examiner provided identical rationales for secondary causation and secondary aggravation, and it is unclear whether the examiner's opinions are predicated on an inaccurate factual premise. Secretary's Brief at 24-30. The Secretary also concedes that the Board failed to address a reasonably raised theory of entitlement for service connection for the appellant's renal mass. *Id*. For the following reasons, the Court will set aside the August 2021 Board decision and remand the matters for further development and readjudication.

I.

The Veterans Administration was established in 1930 when Congress consolidated the Bureau of Pensions, the National Home for Disabled Volunteer Soldiers, and the U.S. Veterans' Bureau into one agency. Act of July 3, 1930, ch. 863, 46 Stat. 1016. This Court was created with the enactment of the Veterans' Judicial Review Act (VJRA) in 1988. *See* Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). Before the VJRA, for nearly 60 years VA rules, regulations, and decisions lived in "splendid isolation," generally unconstrained by judicial review. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994) (Souter, J.).

Yet, the creation of a special court solely for veterans is consistent with congressional intent as old as the Republic. Congress first sought judicial assistance in affording veterans relief when it adopted the Invalid Pensions Act of 1792, which provided "for the settlement of the claims of widows and orphans . . . and to regulate the claims to invalid pensions," for those injured during the Revolutionary War. Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)). The act, though magnanimous, curtailed the power of the judiciary, by providing the Secretary of War the ability to withhold favorable determinations to claimants by circuit courts if the Secretary believed that the circuit court had erred in favor of the soldier based on "suspected imposition or mistake." *See id.*

Chief Justice John Jay[1] wrote a letter[2] to President George Washington on behalf of the Circuit Court for the District of New York[3] acknowledging that "the objects of this act are

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[1] John Jay served as the first Secretary of State of the United States on an interim basis. II DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 872 (4th ed. 2004). Although a large contributor to early U.S. foreign policy, Jay turned down the opportunity to assume this position full time. *Id.* at 872, 916. Instead, he accepted a nomination from President Washington to become the first Chief Justice of the Supreme Court on the day the position was created by the Judiciary Act of 1789. *Id.* Jay resigned his position in 1795 to become the second Governor of New York. *Id.* He was nominated to become Chief Justice of the Supreme Court again in December 1800, but he declined the appointment.

[2] The Supreme Court never decided *Hayburn's Case*. *See* 2 U.S. (2 Dall.) 409, 409 (1792). The case was held over under advisement until the Court's next session and Congress adopted the Invalid Pensions Act of 1793, which required the Secretary of War, in conjunction with the Attorney General, to "take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States." Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793). *Hayburn's Case* has often been cited as an example of judicial restraint, *see, e.g.*, *Tutun v. United States*, 270 U.S. 568 (1926), but Supreme Court historian Maeva Marcus has argued persuasively to the contrary. *See* Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527. After all, Jay's letter included by Dallas, the Court Reporter, in a note accompanying the decision to hold the matter under advisement, is nothing more than an advisory opinion that compelled Congress to change the law in order to make the judiciary the final voice on the review of a Revolutionary War veteran's right to pension benefits. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.

[3] At this time, each Justice of the Supreme Court also served on circuit courts, a practice known as circuit

exceedingly benevolent, and do real honor to the humanity and justice of Congress." *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792). Jay also noted that "judges desire to manifest, on all proper occasions and in every proper manner their high respect for the national legislature." *Id*.

This desire to effect congressional intent favorable to veterans has echoed throughout the Supreme Court's decisions on matters that emanated from our Court. *See Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S. Ct. 1696, 1709 (2009) (Souter, J., dissenting) ("Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"); s*ee also Henderson v. Shinseki*, 562 U.S. 428, 440, 131 S. Ct. 1197, 1205 (2011) (declaring that congressional solicitude for veterans is plainly reflected in "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," and emphasizing that the provision "was enacted as part of the VJRA [because] that legislation was decidedly favorable to the veteran"). In the words of Justice Paterson, "[j]udges may die, and courts be at an end; but justice still lives, and, though she may sleep for a while, will eventually awake, and must be satisfied." *Penhallow v. Doane's Adm'r*, 3 U.S. 54, 79 (1795).

II.

Justice Alito[4] observed in *Henderson v. Shinseki* that our Court's scope of review is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. at 432 n.2 (2011); *see* 38 U.S.C. § 7261. "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. The statutory command that a single judge[5] may issue a binding

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riding. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015).

[4] Justice Alito was born in Trenton, New Jersey. SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 4, 2020). He began his career as a law clerk, then became assistant U.S. attorney for the district of New Jersey before assuming multiple positions at the Department of Justice. *Id*. He then became a U.S. attorney for the district of New Jersey. *Id*. Before his nomination for the Supreme Court, he spent 16 years as a judge on the U.S. Court of Appeals for the Third Circuit. *Id*. In 2005, President George W. Bush chose Alito to replace retiring Supreme Court Justice Sandra Day O'Connor. *Id*.

[5] From 1989 to 1993, West (the publisher of this Court's decisions) published this Court's single-judge decisions in tables in hard-bound volumes of West's *Veterans Appeals Reporter*. Since 1993, West has published this Court's single-judge decisions electronically only. I believe the Court should publish all its decisions in print form.

decision is "unambiguous, unequivocal, and unlimited," *see Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). The Court's practice of treating panel decisions as "precedential" is unnecessary, particularly since the Court's adoption of class action litigation. *See Wolfe v. Wilkie*, 32 Vet.App. 1 (2019) (order), *rev'd sub nom. Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022). We cite these decisions from our Court merely for their guidance and persuasive value.

III.

The appellant served on active duty in the U.S. Army from November 1965 to November 1968, including service in Vietnam, as a pipeline specialist. R. at 7761 (DD Form 214). The appellant earned many medals and commendations for his service, including a Vietnam Service Medal, a Vietnam Campaign Medal, two Overseas Service Bars, and an Expert-Grade Marksmanship Qualification Badge with the M-14 rifle. *Id*.

The appellant was treated for right knee pain in May and December 1966. R. at 7670, 7667, 7644. He reported that his right knee felt as if it were going to give out. R. at 7667.

IV.

In November 2006, the appellant applied for disability benefits, seeking service connection for a right knee condition. R. at 7764-82. In April 2007, the appellant was treated for right knee pain. R. at 7573. He reported suffering from right knee pain on and off since his military service and claimed he first injured his right knee when his knee gave out while he was running at Fort Latimer. *Id*. In May 2007, the appellant underwent a VA joints examination, R. at 7633-35, during which he was diagnosed with degenerative joint disease of the right knee. R. at 7634. Later that month, the regional office (RO) denied service connection for a right knee condition. R. at 7624-31. The appellant did not appeal this decision and it became final.

In May 2010, the appellant filed to reopen his right knee claim and a new claim for service connection for a spot on his kidney. R. at 7318. He alleged that he injured his right knee in 1966 at Fort Leonard Wood while training to be sent to Vietnam. *Id*. In September 2010, the RO reopened the appellant's right knee condition claim (claimed as a pulled muscle in the knee), but

See, e.g., Passaic Cty. Bar Ass'n v. Hughes, 401 U.S. 1003 (1971).

the RO denied service connection on the merits. R. at 7267-72. The RO also denied service connection for a renal mass (claimed as a spot on the kidney). *Id*.

In March 2014, the RO granted service connection for diabetes mellitus, type 2, associated with herbicide exposure, with a 20% disability rating, effective October 9, 2013. R. at 6270-71. In July 2014, the RO granted service connection for diabetic nephropathy, with a 0% disability rating, effective May 14, 2014. R. at 6093-99.

During an April 2016 VA knee examination, R. at 4782-91, the appellant reported that he suffered from severe right knee pain and since 2011 was receiving cortisone injections every 3 months from a private orthopedist. R. at 4783. A November 2016 VA kidney examiner noted that the appellant was diagnosed with diabetes mellitus, type 2, in 2009 and chronic kidney disease (diabetic nephropathy) in 2011. R. at 4692. Between January 2017 and September 2018, the appellant received treatment for right knee pain and osteoarthritis, including cortisone injections. R. at 4151-55, 4096-99, 4086-89, 4077-80, 4068-71, 4045-48.

In October 2017, the appellant testified before the Board, R. at 4324-53, that he served in Bien Hoa, Vietnam, where he regularly worked in the water and around leeches while the Army was constructing a pipeline, a pumping station, and a field depot for fuel to be offloaded from boats to a distribution point; and in his testimony he attributed his renal mass to serving in Vietnam. R. at R. at 4331-32. He further testified that (1) he injured his knee in Vietnam when his leg gave out while he was carrying a large section of pipe; (2) after injuring his knee, he went back to the base and received treatment until the condition of the knee improved; (3) he went back to sick-call later in service to be treated for right knee instability and difficulty walking; and (4) he probably sought medical treatment for his right knee within the first 12 months of leaving service. R. at 4333-38.

In October 2018, VA obtained addendum medical opinions for the appellant's right knee and renal mass claims. R. at 4034-36. In an August 2019 Board decision, the Board found the appellant "competent to report having experienced right knee symptoms since service," R. at 3590, but the Board denied service connection for a right knee disorder. R. at 3589-93. The Board also remanded the renal mass claim because the October 2018 VA examiner failed to provide an opinion regarding secondary service connection. *Id*. In August 2020, the Court granted a joint motion for partial remand (JMPR), R. at 3054, after the parties agreed that the October 2018 VA

right knee medical opinion was inadequate because the examiner "did not consider the competent reports of knee pain when rendering a nexus opinion." R. at 3049-50.

In February 2021, the Board implemented the JMPR and remanded both the appellant's claims to obtain new medical opinions. R. at 3018-20. The Board instructed the RO to "[o]btain medical opinions from medical professionals with appropriate expertise to determine the etiology of the diagnosed right knee disorder and renal mass" that specifically considered the appellant's lay statements of having right knee pain since service and whether the renal mass was caused or aggravated by the appellant's service-connected diabetic nephropathy. R. at 3019-20.

In April 2021, VA obtained the required medical opinions from Jamie Chapman, nurse practitioner-general practice. R. at 79-90. The examiner opined that it was less likely than not that the appellant's right knee condition was incurred in or caused by service because though the appellant was treated for right knee pain during service, his separation examination revealed no abnormality and was silent for any knee concerns. R. at 84. The examiner reasoned that

> [t]here is no medical evidence to support [the appellant's] right knee was caused or worsened beyond a normal progression due to military service. Osteoarthritis diagnosed 50 years later is more likely due to age and general wear and tear than military service. [The appellant's] lay testimony establishes a subjective chronicity of symptoms but he is not qualified to ascribe symptoms to a diagnosis or determine an etiology. The medical model states all decisions of medical professionals are to be based on credible medical evidence. Lay testimony does not constitute credible diagnosable medical evidence. A condition of suggested severity would have certainly required medical attention over the past 40+ years. A nexus has not been established.

Id. The examiner also opined that it was less likely than not that the appellant's renal mass was incurred in or caused by service; or due to or aggravated by his service-connected diabetic nephropathy. The examiner explained that the appellant's service treatment records were silent for any kidney issues, and the appellant's

> C-file [claims file] shows VA urology note 5/2009 aorta U/S showed possible renal mass, MRI revealed renal cysts with no symptoms. [The appellant was] diagnosed with DM2 in 2013 and diabetic renal nephropathy found in 2015 – therefore the renal cysts were present several years before the DM2 was diagnosed. Medical literature does not support simple renal cysts as being caused by Agent Orange (AO) exposure. There is no medical evidence provided to support [that the appellant's] renal cysts were due to or aggravated by his diabetic nephropathy nor his AO exposure

R. at 80, 88.

V.

In August 2021, the Board relied on the April 2021 VA examiner's opinion, R. at 8, when it denied service connection for a right knee disorder. R. at 6-9. In reaching this determination, the Board noted that the appellant had been treated for right knee pain during service and had been diagnosed with right knee degenerative joint disease in April 2007 and arthritis in April 2016. R. at 7. The Board also found the appellant "competent to report having experienced right knee symptoms since service, [but] he does not have the training or credentials to provide a diagnosis in this case or determine that these symptoms were manifestations of arthritis." *Id*.

The Board also denied service connection for a renal mass, to include as due to exposure to herbicide agents and as secondary to service-connected diabetic nephropathy. R. at 9-11. The Board noted that the appellant is currently diagnosed with a renal cyst and the evidence shows that he suffered in-service herbicide exposure. R. at 9. Yet, the Board relied on the April 2021 VA examiner's opinions when it concluded that the preponderance of the evidence weighs against finding that the appellant's renal cyst began during service or is otherwise related to an in-service injury, event, or disease; or is proximately due to or the result of, or aggravated beyond its natural progression by the appellant's service-connected diabetic nephropathy. R. at 9-10. This appeal ensued.

VI.

"The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C § 5103A(a). "In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1).

When the Secretary undertakes to provide a veteran with a VA medical examination or opinion, he must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), and "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Id*. (quoting *Ardison v. Brown*,

6 Vet.App. 405, 407 (1994)); s*ee also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."). VA is required to "return the [examination] report as inadequate for evaluation purposes" if the report "does not contain sufficient detail." *See* 38 C.F.R. § 4.2 (2022).

The Board is required to address all issues and theories that are reasonably raised by the claimant or the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). In this regard, VA has a duty to "give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (citing *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)). The Court has jurisdiction to review whether the Board erred in failing to consider a reasonably raised issue or theory of entitlement. *See Barringer v. Peake*, 22 Vet.App. 242, 244 (2008); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 3 (2009) (per curiam order) (noting that the Court has "jurisdiction to remand to the Board any matters that were reasonably raised below that the Board should have decided, with regard to a claim properly before the Court, but failed to do so").

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[examination] report as inadequate for evaluation purposes" if the report "does not contain sufficient detail." *See* 38 C.F.R. § 4.2 (2022). "An opinion based upon an inaccurate factual premise has no probative value." *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993)).

"Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record." 38 U.S.C. § 7104(d)(1). This statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that VA decisionmakers do not exercise "naked and arbitrary power" in deciding entitlement to disability benefits. *See Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886) (Matthews, J.).

VII.

The Court agrees with the parties that the Board erred for failing to return the April 2021 VA renal mass medical opinion for clarification. *See* 38 C.F.R. § 4.2. The April 2021 VA medical examiner concluded that it was less likely than not that the appellant's renal mass was incurred in or caused by service; or due to or aggravated by his service-connected diabetic nephropathy. R. at 80, 88. However, the examiner provided identical rationales for direct service connection, secondary causation, and secondary aggravation, *id.*, without explaining how the rationale applied to each theory of entitlement. *See Nieves-Rodriguez*, 22 Vet.App. at 301.

Similarly, the examiner opined that because the appellant was first diagnosed with a renal cyst in May 2009, this condition could not have caused his diabetes mellitus, type 2, or diabetic nephropathy because those conditions were not diagnosed until 2013 and 2015, respectively. R. at 80, 88. Yet, the appellant was diagnosed with diabetes mellitus, type 2 in 2009 and diabetic nephropathy in 2011. R. at 4692. It appears that the examiner's opinion is based on an inaccurate factual premise. *Reonal*, 5 Vet.App. at 461. Remand is required for the Board to seek clarification of the April 2021 VA renal mass medical opinion. 38 C.F.R. § 4.2.; *Nieves-Rodriguez*, 22 Vet.App. at 301; *Stefl*, 21 Vet.App. at 123.

The Court also agrees with the parties that the Board provided an inadequate statement of reasons or bases for denying service connection for a renal mass. 38 U.S.C. § 7104(d)(1). In October 2017, the appellant testified before the Board that he believed his renal mass was a result of serving in Vietnam, where he regularly worked in water and around leeches. R. at 4331-32. Though the Board noted the appellant's in-service herbicide exposure, R. at 9, the Board never

addressed this theory of direct service connection. Remand is required for the Board to consider whether the appellant's renal mass is the result of his serving in the water and being exposed to leeches in Vietnam. *See Robinson*, 21 Vet.App. at 552.

Finally, the Court concludes that the Board erred by failing to return the April 2021 VA knee examiner's opinion for clarification. *See* 38 C.F.R. § 4.2. The April 2021 VA examiner concluded that it was less likely than not that the appellant's "right knee was caused or worsened beyond a normal progression due to military service," in part because "[a] condition of [this] suggested severity would have certainly required medical attention over the past 40+ years." R. at 84. Yet, the appellant testified before the Board that he not only suffered right knee pain after service, but he also sought treatment for the pain. R. at 4338. The examiner appeared to overlook this statement when rendering his opinion. Remand is required for the Board to seek clarification of the April 2021 examiner's opinion and ensure the examiner provides an adequate rationale. *See* 38 C.F.R. § 4.2; *Nieves-Rodriguez*, 22 Vet.App. at 301.

On remand, the Board should also ensure that the new VA medical examinations comply with the terms of the February 2021 Board remand order. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) (the Board errs when it fails to ensure compliance with the terms of a remand). The February 2021 Board remand order instructed the RO to "[o]btain medical opinions from medical professionals with appropriate expertise to determine the etiology of the diagnosed right knee disorder and renal mass." R. at 3019. The April 2021 VA medical opinions were proffered by a general practice nurse practitioner and it is unclear whether an individual with those credentials has the "appropriate expertise to determine the etiology" of the conditions at issue.

Because the Court is remanding the appellant's claims, it will not address his remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

VIII.

For the foregoing reasons, the August 3, 2021, Board decision is SET ASIDE, and the matters are REMANDED for further development and readjudication.

DATED: April 21, 2023

Copies to:

Glenn R. Bergmann, Esq.

VA General Counsel (027)